United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1464

To Be Argued By

Bob A. Kramer

B P/S

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

-against-

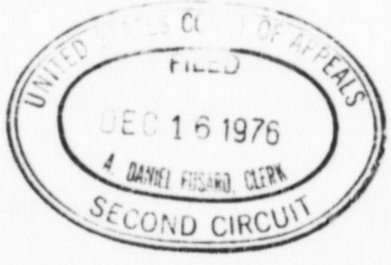
COSME A. CACERES, LEOPOLD LOZANO
AND JOSE A. LIRIANO

Defendant-Appellant

Docket Nos.
76-1464
76-1465
76-1466

APPELLANT JOSE A. LIRIANO'S

BRIEF ON APPEAL



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UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

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PRELIMINARY STATEMENT

The indictment number is 76 Cr 182. The names of the parties are - The United States Of America -v- Cosme A. Caceres, Leopold Lozano and Jose A. Liriano.

The action was commenced by an indictment charging the defendant-appellant Jose A. Liriano, with unlawfully, intentionally and knowingly possessing, uttering and passing counterfeit United States Currency, aiding, abetting and conspiracy.

This is an appeal from a verdict of the District Court for the Eastern District of New York, entered June 15, 1976, convicting the defendant-appellant Jose A. Liriano of all eight counts of the indictment of unlawfully, intentionally and knowingly possessing, uttering and passing counterfeit United States Currency, aiding, and abetting and conspiracy.

The defendant-appellant, Jose A. Liriano was sentenced before the Hon. Judge Henry Bramwell on September 17, 1976, to a two year suspended sentence and placed on probation for three years under the first count of the indictment and on all remaining seven counts of the indictment imposition of sentence was suspended and the defendant was placed on three years probation to run concurrently with the sentence imposed under Count One.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

COSME A. CACERES, LEOPOLD LOZANO
AND JOSE A. LIRIANO

Defendant-Appellent.

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FACTS

Governments' Case

The first witness called by the Government was Richard Simmons. Mr. Simmons testified that he was a part owner of a candy store called Sip & Smoke, located at 208-16 Broadway, Astoria, New York. (24).* On October 31, 1975, at approximately 6:30 p.m. Mr. Simmons was in his store when his partner came over to him and handed Mr. Simmons what the partner thought was a counterfeit $20.00 bill (26-29). After looking at the bill Mr. Simmons gave it back to his partner and left the store for the purpose of looking for the indiviual who may have given his partner the bill in question. Simmons gave the $20.00 bill back to his partner and this bill was never seen again and never introduced into evidence. (29)

*Numbers in parenthesis refer to pages of Trial Transcript

Simmons went on to testify that he got into his car and drove around the area until he saw what appeared to be the same individual (a black man wearing a green plaid jacket) enter Leo Petes' Grocery Store (30l). While he continued down the street Simmons noticed a long green car with two dark skinned males sitting in it with the lights out and parked against the curb one-half block from Leo Petes' Grocery (31). The man in the green plaid suit came out of the grocery store and crossed the street and entered the aforesaid car. The car then pulled away and Simmons, while following the car, was able to record the license number of the car (33). Simmons observed the car come to a stop and an individual got out of the car and went into La Pasticceria Bakery. At this time Simmons rode away looking for a police car. On Steinway Street and Broadway Simmons approached a police officer (who was at the scene of a previous accident) and told the officer that he believed some people in a green car were passing phony money (35). The policeman followed Simmons in their patrol car to the bakery and one of the officers went in and spoke to one of the indiviuals inside. Simmons observed the police officer come out of the bakery and go across the street to a bank. When the officer came back Simmons then gave him the license plate number of the car and gave him a description of the three individuals in the car (37-38). At trial Mr. Simmons was not able to identify the individual who allegedly passed the $20.00 bill to his partner.

On the day after the alleged crime was committed Simmons picked out a photograph of the defendant Caceres as the individual who gave the bill to his partner. During trial Simmons indentified the defendant Lozano as the individual who passed the bill to his partner. He also stated that he could not identify the individual who passed the bill (72).

The next witness to testify on behalf of the Government was Peter Kardasis, part owner of Leo-Pete Grocery Store, located at 1455 Broadway, Queens, New York. He testified that on October 31, 1975, he handed over to a New York City police man two $20.00 bills about one-half hour after one of the bills was given to him by an individual who purchased a pack of cigarettes (89). Kardasis testified that he started work on October 31, at approximately 6:45 p.m., and that at that time he knew he had only one $20.00 bill in the register. At approximately 7:00p.m. an individual gave him the other $20.00 bill in exchange for a pack of cigarettes and the accompanying change. Kardasis did not know when the first $20.00 bill came into the store and could not state which was the $20.00 given to him by the individual at 7:00 p.m. and which one was already in the register when he first came to work at 6:45 p.m. (96). Kardasis could not identify the individual who gave him the $20.00 bill (101).

The next witness to testify was Josephine Polizzi who stated on October 31, 1975, she was employed as a saleswoman at the Pasticceria La Torre Bakery at 32-19 Broadway, Queens, N.Y. She testified that on October 31, an individual came into the bakery somewhere around 6:30 p.m. and bought some cookies and paid for them with a $20.00 bill. About five minutes later a police officer came into the bakery and after a conversation with the police officer, she handed him the $20.00 bill. She could not identify the individual who handed her the bill (106-108).

New York City Police Officer Thomas Gaffney was the next individual to testify on behalf of the Government. On October 31, 1975, he was working with his partner on routine patrol in Astoria, Queens, At approximately 7:00 p.m., while assigned to an accident on Broadway and Steinway Street, he was approached by Richard Simmons. He then followed Simmons to a bakery and had a conversation there with an employee named Josephine who then handed him a $20.00 bill. He then took the bill across the street to a bank and after having a conversation with the manager of the bank came back out and asked Simmons if he had any more information for him. After learning the license plate number and description of the car he proceeded to look for the car in question (111-113).

On Broadway, between 38th Street and Steinway Street, he observed the car with three males in it. Caceres was seated in the back seat and the appellant Liriano was seated behind the steering wheel in the driver's seat (114). Gaffney proceeded to place his patrol car in front of the defendants' car, got out of his car, and went along side of the driver of the other car and asked for his license and registration. The three men got out of their car and Gaffney placed handcuffs on the defendant Liriano. At this time somebody in the crowd that had formed around the two cars yelled out that some kids were running off with a brown paper bag (115). Gaffney proceeded to run after the kids and recovered the bag approximately 250 feet from the car (117). The bag contained five counterfeit $20.00 bills (118). Officer Gaffney did not see who, if anybody, dropped the bag and he did not know where it came from (119).

Upon coming back to the car Gaffney called for a radio car to take the prisoners back to the stationhouse. Upon looking into the defendants' car he observed a brown paper bag containing 4 or 5 different wrappers of United States Currency. This bag contained 34 $5.00 bills, 26 $10.00 bills, 8 $1.00 bills, 50 $1.00 bills and 50 $1.00 bills (121).

After the defendants were taken to the stationhouse, Gaffney and his partner went to Leo-Petes' Grocery Store, and

had a conversation with Kardasis who handed him two $20.00 bills. Gaffney and his partner then returned to the stationhouse (129).

At the stationhouse the defendant Liriano was searched and a $50.00 counterfeit bill was found in his wallet (135). After reading the Miranda Warnings to Caceres, the only one of the three defendants who spoke English, Caceres told Gaffney that he found a bag of money in the back seat of his cab that he operates about two weeks before his arrest. Caceres then said that he went to a friend who told him the money was bad (137).

Eva Walken, manager of Walkens' Bakery was the next witness to testify in behalf of the Government. Ms. Walken testified that on October 31, 1975, at approximately 6:00 p.m. she took out all ten and twenty dollar bills from the register and that she again checked the register at 7:00 p.m. She found one $20.00 bill which looked different than the others and she sent this bill to the Secret Service. She did not know who had given her the bill (163).

United States Secret Service Special Agent Charles J. Quinn, Jr. was the next individual to testify on behalf of the Government. He testified that on October 31, 1975, he was called to the 114th police precinct where he met the defendants for the first time. From there he took the defendants to Secret Service Headquarters in The World Trade Center. At this time he interviewed the defendant Caceres after he gave him his rights and

Caceres signed a waiver form (174). Mr. Caceres' statement was reduced to writing and Quinn went on to testify that Caceres then read and signed the statement (175).

Dario Marquez, Special Agent, United States Secret Service, was the next witness to testify. He testified that Lozano signed a Warning and Waiver of Rights form (which was written in Spanish) after it was read to him in Spanish and also read by Lozano (205).

Lozanos' statement, which was read into evidence, was that he was approached by defendant Caceres on October 31,1975, who told him that he had some counterfeit bills which he had found and that he wanted Lozano to help him and that he and Caceres had passed about three or four bills before they were arrested (208). Marquez ther testified that he interviewed Liriano next. Liriano stated that he did not know what was going on. At this point Marquez testified that Liriano told him that the other two defendants had discussed the counterfeit money and that Liriano was given a $50.00 bill. Liriano further said that he only drove the automobile and never passed any money. He said that he was curious about the money and asked Caceres if he could have the $50.00 bill as a souvenir (219). Liriano would not sign any statement and none were reduced to writing for him to sign (220). Marquez testified that during the time he was questioning Liriano a Special Agent Smith was present and that he, Marquez, would translate the questions and answers for him into English (239).

Marquez never made any written notes of his interview with Liriano (240).

The last witness to testify on behalf of the Government was Special Agent Phillip S. Smith. Agent Smith testified that on November 4, 1975, the defendants car was inventoried and that $100.00 in legal United States Currency was found in the ashtray of the car. He further testified that there were several items of groceries strewn about the car (277). Agent Smith went on to testify as to the authencity of all the bills in question stating which were and which were not counterfeit. Agent Smith testified that he was present when Agent Marquez was questioning Liriano and that since he did not know Spanish, the questions and answers were translated into English by Agent Marquez. Of special interest is the fact that when Agent Smith wrote down his notes concerning this particular interview, the only notation he made about Liriano's statements was, "Suspect Liriano refused to provide the special agent with a signed sworn statement. Liriano did say that he was driving the car that night for Lozano and Caceres." No mention was made in Smith's report about any other oral statements allegedly made by the defendant Liriano (316).

Defendants' Case

The defendant Cosme A. Caceres testified in his own behalf. He testified that his wife had just given birth to their son and that on October 31, 1975 he went to Astoria, Queens,

for the purpose of buying his wife a bassinet that he remembered seeing in this particular area while he was driving his cab. While in this area he decided to stop in some stores to buy food for a Halloween party he was going to give for his friends. With him were the defendants Lozano and Liriano (328-9). He went on to testify that he took his two friends Lozano and Liriano so that they could keep him company and help him with his shopping. They left the Bronx about 4:30, 5:00 p.m. right after Lozano and Liriano had finished working. Lozano and Caceres were the only ones to do the shopping while Liriano drove the car. (331)

Caceres testified that there was only one paper bag in the car containing money. There was approximately $500.00 in the bag. This money had come from his savings which were kept in his house and were to be used for baby furniture and clothing. The rest of the money was found in the cab he was driving approximately two weeks before he was arrested. He testified that this money was found in a white envelope that was dropped by an individual who exited his cab somewhere on 125th Street. Caceres testified that the money in the envelope amounted to approximately $550.00 (335).

Caceres denied that he ever knew that the money he found was counterfeit and that he recruited Lozano and Liriano to help him pass the "bad" money (345-358).

The next defense witness to be called was Leopold Lozano. Lozano testified, with aid of an interpreter, that on October 31, 1975, he owned his own radio and television repair

and television repair shop at 897 SouthernBlvd., Bronx, New York. Lozano testified that on October 31, at approximately 5:00 p.m., the defendant Caceres, whom Lozano had known since a child in Santo Domingo, came into his shop and asked him if he would go with him while he went shopping. Lozano agreed and he and Liriano closed the store and accompanied Caceres to Queens (407-9). Once in Queens Caceres gave Lozano two $20.00 bills and requested Lozano to help him do some shopping. Lozano made one purchase and returned the change and the other $20.00 bill to Caceres (422-3). Lozano testified that he purchased some cookies at a bakery and that he saw Caceres enter various stores to make additional purchases. The purchases that were made by Lozano were for himself and his brother but nothing was purchased for Caceres (428-9). Lozano testified that Caceres told him that he had wanted to buy a bassinet for his daughter (431), and that he had wanted to buy some other items to make a party for his family and friends (432).

Lozano further testified that after he was arrested and taken to the Secret Service Headquarters the only statement he made to any agent was that he did not know anything about counterfeit money and that the only thing he did was to accompany Caceres while the latter did some shopping. He admitted signing a statement but signed it only because he was told to sign it by Agent Marquez (441).

The last witness to be called for the defense was the defendant - appellant Jose A. Liriano. Liriano testified that

he was never convicted of a crime or even arrested before the instant arrest. On October 31, 1975, he was employed by the defendant Lozano as a radio and television repairman (447). Liriano testified that on the night before he was arrested the defendant Caceres came to his home. During the evening Caceres told Liriano that he, Caceres, had found some money and Liriano asked Caceres if he could borrow $50.00. Caceres loaned Liriano the $50.00 and this was the $50.00 bill which Liriano had in his wallet the night he was arrested (448).

On October 31, 1975, while Liriano was working in Lozanos' store, Caceres came into the store and invited both Lozano and Liriano to go shopping with him (449). Liriano went on to testify that Caceres drove the car to Queens and that once in Queens Caceres asked Liriano to drive the car while he went shopping. Both Lozano and Caceres left the car on various occassions to do some shopping while Liriano stayed in the car (450, 469).

Liriano went on to testify that there was a brown paper bag with money in it on the front seat next to him. Whenever Caceres left the car to do some shopping he would first take money from the bag and then go into one of the stores. Liriano would then see Caceres come back to the car and put various items in the trunk of the car. (451-2, 472)

The first time Liriano was told that the $50.00 bill he had in his wallet was counterfeit was when he was being questioned by Agent Marquez at the Secret Service Headquarters (454).

Liriano denied ever knowing that the money was counterfeit or that Caceres was allegedly passing counterfeit currency. (456-459).

POINT I

THE JUDGEMENT OF CONVICTION SHOULD BE REVERSED ON THE GROUND THAT THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT, AS A MATTER OF LAW, TO PROVE THE DEFENDANT LIRIANO GUILTY BEYOND A REASONABLE DOUBT

The defendant Liriano was charged with the crimes of unlawfully, intentionally and knowingly possessing, uttering and passing counterfeit United States currency. The eight count indictment charged the defendant Liriano, with four counts of actually passing counterfeit currency, and two counts of possessing counterfeit currency, and one count of conspiracy. The remaining count charged the co-defendant Caceres with possession of counterfeit currency.

The only evidence adduced at trial against the defendant Liriano was that he was driving a vehicle for his friend and co-defendant Caceres while the latter was allegedly passing counterfeit currency while shopping at various stores. At the time of his arrest the defendant Liriano was in possession of one counterfeit $50.00 bill which was found in his wallet by the arresting officer pursuant to a post-arrest search.

Since the defendant Liriano never actually passed any counterfeit currency to another individual, the Government's contention was that Liriano knowingly aided and abetted the co-defendants in their attempts to pass counterfeit currency. It was the Government's further contention that the defendant Liriano

conspired with the co-defendants to unlawfully, intentionally and knowingly possess, utter and pass counterfeit United States currency.

Proof of the passing of counterfeit currency does not by itself give rise to an inferance of guilty knowledge which is an essential element of the crime. United States v. Releford (C. A. Tenn. 1965) 352 F. 2d 36; Zottarelli v. United States (C. C. A. Ohio 1927) 20 F. 2d 795, cert. denied 275 U. S. 571, 48 S. Ct. 159, 72 L. Ed. 432. Therefore, in order to convict a defendant of the crime it is imperative to prove that the defendant had knowledge that the bills were counterfeit and that the passing was done with the intent to defraud. United States v. Brown (C. A. N. Y. 1965) 348 F. 2d 661; Mason v. United States (C. A. Mich. 1953) 203 F. 2d 904; United States v. Musguiz (C. A. Tex. 1971) 445 F. 2d 963.

In a prosecution for passing counterfeit United States currency, it is the Government's obligation and duty to produce evidence from which a jury could find that the defendant who had not done the actual passing knew that the bills passed by a co-defendant were counterfeit. United States v. Berkley, (C. A. Ohio 1961) 288 F. 2d 713, cert. denied 368 U. S. 822, 82 S. Ct. 41, 7 L. Ed. 2d 27. It must also be proved that the defendant had a general intent to defraud unknown parties with those bills. United States v. Pitts, (C. A. Ark. 1974) 503 F. 2d 1237, cert. denied 421 U. S. 967.

During the trial of the instant matter, no evidence was produced which showed that the defendant Liriano actually passed

any counterfeit currency. Accordingly, the Government had to establish that the defendant Liriano entered into a conspiracy to pass counterfeit currency and that he aided and abetted the co-defendants who did the actual passing.

The essential elements of a conspiracy are an agreement by two or more persons to commit an offense against the United States and an overt act by one of them in furtherance of the conspiracy. United States v. Issacs, (C.A. Fla. 1975) 516 F.2d 409; United States v. Reynolds (C.A. Fla. 1975) 511 F.2d 603; United States v. Perez (C.A. La. 1973) 489 F.2d 51, rehearing denied 488 F.2d 552, cert. denied 417 U.S. 945, 94 S. Ct. 3067, 41 L. Ed. 2d 664; United States v. Rosner (C.A.N.Y. 1973) 485 F.2d 1213, cert. denied 417 U.S. 950, 94 S. Ct. 3080, 41 L. Ed. 2d 672; United States v. Thomas (C.A. Okl. 1972) 468 F.2d 422, cert. denied 410 U.S. 935, 93 S. Ct. 1389, 35 L. Ed. 2d 599; United States v. Falcone (N.Y. 1940) 311 U.S. 205, 61 S. CT. 204, 85 L. Ed. 128.

Where the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had specific intent to violate a substantive statute. United States v. Cangiano (C.A.N.Y. 1974) 491 F.2d 906, cert. denied 419 U.S. 904, 95 S. Ct. 188, 42 L. Ed. 2d 149. When a substantive offense requires specific knowledge, that same knowledge must be established before a defendant can be found to be a member of a conspiracy to commit the offense. This applies

equally to an aider and abettor as to a conspirator and the requisite knowledge cannot be imputed from one aider and abettor or conspirator to another. United States v. Tavoularis (C.A.N.Y.1975) 515 F.2d 1070; United States v. Aloi (C.A.N.Y.1975) 511 F.2d 585; United States v. Johnson (C.A.Ill.1974) 504 F.2d 622; United States v. Bekowies (C.A.Ore.1970) 432 F.2d 8; United States v. Marco (C.A.N.Y. 1973) 488 F.2d 828.

The Government tried to show that because some of the merchandise purchased by the co-defendants was strewn over the back seat of the car which Liriano was driving he must have had knowledge that Caceres was passing counterfeit currency. It is respectfully contended that this fact alone, and even coupled with the fact that Liriano had in his possession one counterfeit $50.00 bill, was not sufficient to prove beyond a reasonable doubt that Liriano knew he was involved in a criminal enterprise. United States v. La Vecchia (C.A.N.Y.1975) 513 F.2d 1210.

It is further contended that the fact that Liriano was driving the vehicle during the time it is alleged that Caceres and Lozano were passing counterfeit currency was not sufficient to prove the defendant Liriano guilty beyond a resonable doubt of aiding and abetting the crime of uttering and passing counterfeit currency.

To be guilty of aiding and abetting a defendant must willfully and knowingly associate himself with an unlawful venture and willfully participate in it as he would in something he wishes to

bring about or to make succeed. United States v. Peichev (C.A.Cal. 1974) 500 F.2d 917, cert. denied, 419 U.S. 966, 95 S.Ct. 229, 42 L.Ed. 2d 182; United States v. Greer (C.A.Ill.1972) 467 F.2d 1064, cert. denied 410 U.S. 929, 93 S.Ct. 1364, 35 L.Ed.2d 590; United States v. Moody (C.A. Mo.1972) 462 F.2d 1307; United States v. Austin (C.A.Kan.1972) 462 F.2d 724, cert. denied 409 U.S. 1048, 93 S.Ct. 518, 545, 547, 34 L.Ed.2d 501; United States v. Harris (1970) 435 F.2d 74, 140 U.S.App. D.C. 270, cert. denied 402 U.S. 986, 91 S.Ct. 1675, 29 L.Ed.2d 152; United States v. Barber (C.A.Del.1970) 429 F.2d 1394.

It was the Government's burden to prove that Liriano participated in the criminal transaction or transactions charged in the indictment. United States v. Key (C.A.Kan.1972) 458 F.2d 1189, cert. denied 408 U.S. 927, 92 S.Ct. 2510, 33 L.Ed.2d 339. It was incumbent upon the Government to prove more than mere presence and knowledge that offenses were being committed. The Government had to prove beyond a reasonable doubt that the defendant willfully associated himself with the venture and willfully particiapated in it as something he wished to bring about and that he willfully sought by some act of his to make it succeed. United States v. Tijerina (C.A.N.M.1971) 446 F.2d 675.

It is the defendants' contention that the evidence produced at trial was insufficient, as a matter of law, to prove him guilty beyond a reasonable doubt of aiding and abetting the alleged criminal activity of the co-defendants. Furthermore, the evidence so produced was not sufficient, as a matter of law, to prove the defendant

guilty beyond a reasonable doubt of conspiring with others to commit a criminal act.

Of particular interest is the case of United States v. Berkley, supra.- In that case the defendants Berkley and Verzi were convicted of passing counterfeited bills. On appeal the defendants contended that their convictions should have been reversed on the grounds that counterfeit bills found in a patrol post driveway five days after the defendants had driven into the post following their arrest should not have been introduced into evidence and, further, that the Government did not sustain their burden of proving the defendants guilty beyond a reasonable doubt. The Court of Appeals held that the five counterfeit $100.00 bills were properly introduced into evidence as there was enough circumstantial evidence to support its relevancy and materiality. However, the Court went on to reverse the conviction of defendant Verzi on the ground that his guilt was not proven beyond a reasonable doubt. The evidence produced at the Berkleytrial showed that both Berkley and Verzie entered a clothing store together and Berkley there purchased a suit of clothes, paying for it with a $100.00 counterfeit bill. Berkley the appropriate change and the defendants left with the suit. Shortly thereafter defendants entered a second clothing store where defendant Verzi selected a suit which was paid for by defendant Berkley with another counterfeit $100.00 bill. Defendant Berkley testified that he had acquired the bills as part of his winnings in the daily double at a race track on the day previous to passing them. On the day in question

Berkley invited Verzie to accompany him to look up an old friend. After they discovered that the friend had moved Berkley and Verzi went to have lunch. At lunch Berkley told Verzi of his previous days winnings amounting to $542.50. At this news Verzi reminded Berkley that the latter owed Verzi $100.00 on a bet previously made between them. Thus reminded, Berkley said he would pay the bet, or if Verzi wished, Berkley would buy Verzi a suit of clothes, Berkley having decided to buy himself a suit. As previously stated, Berkley then bought the suit which Verzi had selected and gave the change to Verzi to complete payment of his wagering debt of $100.00

Defendant Verzi testified that he had no idea of the denominations of the bills that made up the track winnings or whether Berkley actually had them with him. Verzi testified that he never saw the bills used to pay for the suits, that he never saw Berkley throw anything from the car in which he and Berkley were driving on their way to the Patrol Post, and corroborated the winning of the $100.00 bet from Berkley. In sustaining the defendant Berkley's conviction and reversing Verzis' conviction the Court held that they were unable to find any evidence of sufficient probative value to satisfy the Government's burden of proof. They held that Verzi should have been acquitted by direction.

In the case at bar defendant Liriano never passed any of the counterfeit bills in question. Only one $50.00 bill was

found on his person which, Liriano testified, was given to him by defendant Caceres as a loan the night before he accompanied Caceres, at the inviatation of Caceres, to Queens in order to help Caceres do some shopping. It is the defendant Liriano's contention that the condition of the merchandise in the back seat of the car he was driving (the car belonged to the sister of Caceres) was not sufficient to put him on notice that crimes were being committed. Further, Caceres was a cab driver and Caceres testified he always kept his money in a paper bag. Even if this should have, or indeed did, raise Liriano's' suspicions, this still would not have been enough to make him an aider, abettor or conspirator. See United States v. Tijerina, supra; Hogan v. United States (C.C.A. Ohio 1924) 295 F. 656.

The evidence produced at trial of the case at bar, even when take as a whole, was not sufficient, as a matter of law to prove the defendant Liriano guilty beyond a reasonable doubt.

POINT II

IN THE EVENT IT IS HELD THAT THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE JUDGEMENT OF CONVICTION THEN THE JUDGEMENT OF CONVICTION SHOULD BE REVERSED ON THE GROUND THAT THE EVIDENCE INTRODUCED AT TRIAL SHOULD HAVE BEEN SUPPRESSED AS THERE WAS NO PROBABLE CAUSE TO STOP, DETAIN AND ARREST THE DEFENDANT

Prior to trial a hearing on defendant's motion to suppress evidence was held. The defendants contended that all evidence seized from the vehicle in which they were seated, as well as their persons, and all subsequent statements made to the arresting officer and special agents should have been suppressed on the ground that there was no probable cause for the officer to approach and arrest them. The trial judge denied the defendant's motion after the hearing and allowed all physical evidence seized to be admitted at trial as well as all statements.

At the time Officer Gaffney approached the defendants in their vehicle Gaffney considered that they were in his custody and would be arrested (134). At this juncture it must also be pointed out again that when Simmons approached Officer Gaffney and advised him that Simmons' partner had just been given a counterfeit $20.00 bill, Simmons never produced the bill to show Gaffney. Furthermore, that particular $20.00 bill was never introduced into evidence as it was not known what happened to the bill after Simmons returned it to his partner.

It is the general rule of law that any evidence seized from a defendant in violation of his Fourth Amendment rights is excluded from a criminal trial and the "fruits" of such evidence are excludable as well. U.S.C.A. Const. Amend. 4; Brown v. United States, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); United States v. Calandra, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974); Alderman v. United States, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), appeal after remand United States v. Alderisio, 424 F. 2d 20; Ivanov v. United States, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), rehearing denied 394 U.S. 939, 89 S. Ct. 1177, 22 L. Ed. 2d 475, on remand United States v. Butenko, 318 F. Supp. 66, on remand 342 F. Supp. 928, affd. 494 F. 2d 593, cert. denied 419 U.S. 881, 95 S. Ct. 147, 42 L. Ed. 2d 121; Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969), appeal after remand 255 So. 2d 916, cert. denied 409 U.S. 855, 93 S. Ct. 191, 34 L. Ed. 2d 99; Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1962); United States v. Del Toro, (C.A.N.Y. 1972) 464 F. 2d 520; United States v. Karathenos (C.A.N.Y. 1976) 531 F. 2d 26.

The issue involved in the case at bar is whether or not Officer Gaffney had probable cause to approach and arrest the defendants. An arrest to be constitutionally valid depends on whether at the moment the arrest was made the officer had probable cause to make it. Beck v. Ohio, 379 U.S. 39, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1965). Probable cause exists where the facts and circumstance

within the officer's knowledge and of which he had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Brinegar v. United States, 338 U.S.160, 69 S. Ct.1302, 93 L. Ed. 2d 1879 (1949).

The question involved in the case at bar is whether there has been a search or a seizure. If there has been a search or a seizure, then its legality depends on the presence of probable cause. Whether or not a particular search or seizure is to be considered reasonable requires weighing the Government's interest in the detection and apprehension of criminals against the encroachment involved with respect to an individual's right to privacy and personal security. In conducting this inquiry we must consider whether or not the action of the officer was justified at its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible. Terry v. Ohio, 392 U.S.1, 88 S. Ct.1868, 20 L. Ed. 2d 889 (1967); Camara v. Municipal Ct., 387 U.S. 523, 87 S. Ct.1727, 18 L. Ed. 2d 930 (1966); Cupp v. Murphy, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1972).

If the initial stop of the defendant was unlawful the evidence thereafter acquired must be suppressed absent an independent establishment of probable cause. Whenever an individual is physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action, that individual has been seized within the meaning of the Fourth Amendment. Terry v. Ohio, supra. This is true whether a person

submits to the authority of the badge or whether he succumbs to force. Here the defendant was deprived of his freedom of movement when the police vehicle pulled in front of defendant's car. Officer Gaffney testified that at the time he approached the defendants he consi'er[illegible] them in his custody and under his arrest (134). At that moment the defendant could not have proceeded on his way, therefore he was seized.

Before a person may be stopped in a public place a police officer must have reasonable suspicion that such person is committing, has committed, or is about to commit a crime. New York State Criminal Procedure Law Section 140.50. Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand. To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion. Vague or unparticularized hunches will not suffice. Wong Sun v. United States, supra; Terry v. Ohio, supra. Nor will good faith on the part of the police be enough to validate an illegal interference with an individual. Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959); Hill v. California, 401 U.S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1970).

We must now direct ourselves to the question of whether the police officer had knowledge of facts and circumstances sufficient for him to believe that the defendants were engaged in criminal activity. As was previously pointed out, Officer Gaffney's first

involvement with the case at bar was when he was approached by Simmons and informed by him that Simmons' partner had just been given a counterfeit $20.00 bill by individuals who were now passing other counterfeit bills to other storeowners in the area. Officer Gaffney's subsequent actions were all based on his initial contact with Simmons. Thus we are brought to deal with the questions surrounding the area of informers.

Evidence seized pursuant to the information received by a police officer from an informer is not constitutionally obtained unless the police officer seeking a search warrant or justifying his warrantless actions is able to show that he had probable cause for reasonably believing that an offense had been or is being committed. Brinegar v. United States, supra. If probable cause is absent, the evidence seized must be suppressed and cannot be used against the accused regardless of its probative value.

If the police officer sought a warrant or acted without a warrant on the basis of information furnished by an informer, the Supreme Court has held that the requirement of probable cause is satisfied if there is a showing of 1) the basis for the officer's belief in the informer's reliability and 2) of the circumstances indicating the informer's credibility, i.e. a detailing of the circumstances from which the informer concluded that evidence was present or that crimes were occurring. Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). See McCray v. Illinois, 368 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967) applying to a warrantless arrest the same test applied to a search warrant in Aguilar v. Texas, supra.

In order to sustain the constitutionality of a particular search or seizure it is imperative that the affidavits, in search warrant cases, or the testimony, in warrantless cases, set forth enough of the underlying circumstances to demonstrate that there is reason to believe both that the informer is a truthful person and that he has based his particular conclusions in the matter at hand on reliable data.

In the case at bar Officer Gaffney reacted on Simmons' statement without ever inquiring of Simmons where the bill was which was given to his partner. It would seem that any reasonable man would have asked to see the counterfeit bill before he would act on a statement from an informer, even if the informer did supply the officer with his name.

Furthermore, not one single act of passing counterfeit currency was witnessed by Simmons. While Simmons was not a professional informant it is still contended that the information supplied by Simmons was not sufficient to overcome the requirement of probable cause. Simmons testified that he saw the individual in a green plaid jacket enter various stores. He could not see what was purchased, if anything, or what transactions were being conducted. He could not tell what bills were being used to make purchases, or if purchases were in fact being made. It must be remembered that just because his partner received an alleged counterfeit bill, and why Simmons didn't take this bill to show the police officer he went looking for will never be known, it was no evidence that any crimes were being transacted. As previously stated, the mere passing of a counterfeit

bill is not indicative of a criminal act unless done with intent to defraud another.

Still further, when Officer Gaffney went into the La Pasticceria La Torre Bakery and asked one of the employees if she had received a $20.00 bill, the mere fact that he was handed a $20.00 bill, which was later proved to be a counterfeit, was not sufficient to justify his further actions. The employee did not know when the $20.00 bill was received and could not tell the officer who had given it to her. As a matter of fact, not one person who was given a counterfeit bill could tell who gave them the bill. Nothing further was done by Gaffney to corroborate the insinuations of Simmons. Gaffney relied on the fact that Simmons' partner was allegedly given a counterfeit $20.00 bill by a man in a green plaid jacket and also that a $20.00 counterfeit bill was in the register of a store in which Simmons allegedly saw the same man enter, although no one else could verify this fact, as enough facts to stop and seize the defendants.

It is the defendant's contention that there were no independent observations by Officer Gaffney to show probable cause independent of the informant's information and still further, that the personal observations of Officer Gaffney, insufficient in themselves to establish probable cause, did not suffice to corroborate the informant's general reliability or particular knowledge. It is further contended that the information received from Simmons was not so detailed as to be self-verifying. See Spinelli v. United States, 393

U.S. 410, 89 S. Ct. 584, 21 I. Ed. 2d 637 (1969).

It is the Government's contention that reliability need not be proved when the information given the police officer is recieved from a bystander or a victim with no apparent motive to fabricate. Simmons was not a bystander. He owned half the business that was given the counterfeit bill. He also did not have any personal knowledge of the fact that his partner was given a counterfeit bill by one of the defendants. This information he received from his partner. The most glaring defect in the Government's' reasoning that the fact that Officer Gaffney received a counterfeit $20.00 bill from the bakery corroborated Simmons' story, is that the only thing that could corroborate Simmons' story was the counterfeit $20.00 bill which was given to his partner.

As previously stated, probable cause exists where the facts and circumstances within the officer's knowledge and of which he had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Brinegar v. United States, supra. When Gaffney approached the defendants vehicle the person of Liriano was unconstitutionally seized because Gaffney acted on untrustworthy information and without probable cause. Accordingly, all physical evidence seized, as well as all statements, all of which were "tainted" by the initial seizure, should have been suppressed and excluded from evidence.

CONCLUSION

THE JUDGEMENT OF CONVICTION SHOULD BE REVERSED IN ALL RESPECTS AND THE CHARGES DISMISSED

Respectfully submitted,

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